STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
S-3950 McKINLEY PARKWAY, INC.	:	DETERMINATION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1982 through August 31, 1985.	:	

Petitioner, S-3950 McKinley Parkway, Inc., S-3950 McKinley Parkway, Blasdell, New York 14219, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1982 through August 31, 1985 (File No. 804092).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on January 7, 1988 at 9:15 A.M. Petitioner appeared by Malcolm D. Brutman, Esq. The Audit Division appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the Division of Tax Appeals is bound by the results of two prior proceedings involving petitioner and RCA Service Company, wherein RCA sought monies alleged to be sales tax due and owing to it from petitioner pursuant to certain lease agreements, and which resulted in the dismissal of RCA's cause of action on the merits and subsequent dismissal of a second RCA complaint.

II. If not, whether the Audit Division properly determined that sales tax was due and owing from petitioner on payments made to RCA Service Company pursuant to the aforementioned lease agreements.

FINDINGS OF FACT

1. On September 12, 1986, following an audit, the Audit Division issued to petitioner, S-3950 McKinley Parkway, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1982 through August 31, 1985 which assessed tax due of $4,662.15, plus penalty and interest.

2. The deficiency herein consists of two components. The first amounts to $1,582.91 and was determined by the Audit Division from a comparison of taxable sales per petitioner's books with taxable sales per its sales taxreturns with respect to petitioner's fiscal year ended March 31, 1985. Petitioner did not dispute this component of the deficiency.

3. The second component of the deficiency herein, which is disputed by petitioner, was determined by the Audit Division following a review of certain payments made by petitioner to RCA Service Corporation ("RCA") pursuant to the terms of two lease agreements entered into by and between McKinley Park Inn, predecessor to petitioner, and RCA in 1977. Petitioner assumed its predecessor's obligations under the lease agreement. On audit, the Audit Division determined that sales tax was properly payable on such lease payments and that such sales tax had not been paid. The Audit Division then totaled payments made by petitioner pursuant to the leases and calculated sales tax due from that total. Sales tax determined due as a result of the foregoing analysis was $3,079.24.

4. Petitioner owns and operates a business known as "McKinley Park Inn", a motel, restaurant and bar. The same individual, Victor Liberatore, is president of petitioner and was a partner in the predecessor partnership. In 1977, petitioner's predecessor, McKinley Park Inn, a partnership, entered into two lease agreements with RCA Service Company. The first lease agreement, dated July 7, 1977, provided for the lease of telephone equipment for use in petitioner's business operation. This lease had a term of 120 months and listed a rental per month of $746.30.[1] The same parties (McKinley Park Inn and RCA) also executed a lease agreement dated September 19, 1977 which provided for the lease of television sets and a music/paging system. The term of this lease was 84 months and the Agreement called for a "Rental per Month" of $851.00.

5. Both of the aforementioned lease agreements were standard-form agreements used by RCA. Each set forth a "Rental per Month" amount as noted above. Additionally, each agreement included the following provision:

> "4. Rentals. Lessee shall pay to RCA during the term of this Lease _____ equal successive monthly rental payments in the amount specified below. The first rental payment for each location shall be due the day of completion of the installation of the equipment. The aggregate rental of this Lease shall be _____. Payments hereunder will be made to RCA at Cherry Hill, New Jersey or at such other address as RCA may notify Lessee in writing." (The respective term and aggregate rental were inserted in the blank spaces)

6. Each agreement also stated that the agreement was subject to provisions printed on the reverse side of the agreement. The photocopies of the agreements introduced into evidence did not include this reverse side. Such other provisions were thus not introduced into the record in this matter.

7. The agreements contained no definition of "rental" and no explicit indication as to whether sales tax was to be included in the monthly rental amount set forth on each agreement.

8. Neither of the portions of the agreements introduced into the record made any explicit reference to sales tax.

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[1]The parties to this lease also executed an "Equipment Reconciliation Amendment" to said lease in December 1977. This amendment added to and removed from the schedule of leased equipment certain equipment and had the effect of increasing the "Rental per Month" for this lease to $752.00.

9. Following the execution of the agreements, RCA billed petitioner for the amount listed on the agreements as rental per month, and, in addition, billed sales tax based on the monthly rental. Petitioner refused to pay the amount billed as sales tax claiming that the rental per month as set forth in the agreements included any and all sales tax.

10. RCA subsequently brought an action in the Town Court of Hamburg, New York, to collect the amounts listed on the bills as sales tax. The matter was heard before Justice Thomas H. Rosinski on April 23, 1979, and in his written decision dated May 7, 1979, he dismissed the cause of action "on the merits after trial." His written judgment did not state the facts upon which it was based. RCA did not appeal Justice Rosinski's decision.

11. RCA subsequently moved in the Supreme Court, Erie County, to replevy the leased equipment for nonpayment of the sales tax amounts. In an opinion dated May 11, 1981, Justice Joseph J. Ricotta ruled that the prior decision of Justice Rosinski was "the law of this case with reference to sales tax" and that RCA was "not entitled to any sales tax pursuant to said agreements as aforesaid." Pursuant to an order of Justice Joseph S. Mattina, dated July 16, 1981, RCA's complaint was dismissed.

12. During the periods prior to and subsequent to the above-noted actions petitioner refused to pay amounts listed as sales tax on the RCA billing. Subsequent to the conclusion of the Supreme Court action, in September 1986, RCA revised its billings so as to accede to petitioner's position in the dispute; that is, the billings set forth a monthly rental amount plus a sales tax figure with the total amount due approximately equal to the amounts set forth in the lease agreements as rental per month.

CONCLUSIONS OF LAW

A. The Division of Tax Appeals is not bound by the judgment of Justice Rosinski (Finding of Fact "10"), the order of Justice Ricotta (Finding of Fact "11"), or the order of Justice Mattina (Finding of Fact "11"). In determining whether the doctrine of res judicata, or the related doctrine of collateral estoppel is applicable herein, "it must be shown that there is an identity of parties and of issues." (Brugman v. City of New York, 102 AD2d 413, 415.) Neither such identity is present in the instant matter. The Audit Division was not a party to the prior proceedings and petitioner has failed to establish that the identical issue as is at issue herein was previously litigated. In this regard, it is noted that petitioner failed to submit any pleadings, or transcripts of the prior proceedings into the record in this matter. Accordingly, the Division of Tax Appeals is not bound by the judgments and orders issued in connection with the McKinley Park - RCA litigation.

B. It is undisputed that, during the period at issue, sales tax was properly payable by petitioner to RCA on the monthly "receipts" paid by petitioner to RCA for its lease of the equipment described in Finding of Fact "4" (see Tax Law §§ 1105[a]; 1101[b][5]). The dispute in this matter centers upon whether the amount set forth on the agreements as "rental per month" constituted "receipts" for the lease of equipment, or whether, as petitioner argues, such "rental per month" included both "receipts" for the lease of equipment and sales tax on those receipts.

C. "Receipt" is defined for purposes of Tax Law § 1105(a) as follows:

"Receipt. The amount of the sale price of any property and the charge for any

service taxable under this article, valued in money, whether received in money or otherwise, including any amount for which credit is allowed by the vendor to the purchaser, without any deduction for expenses or early payment discounts, but excluding any credit for tangible personal property accepted in part payment and intended for resale and excluding the cost of transportation of tangible personal property sold at retail where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser." (Tax Law § 1101[b][3])

D. The amounts set forth in the lease agreements as "rental per month" constituted "receipts" for the lease of equipment within the meaning of Tax Law § 1101(b)(3) and were therefore properly subject to tax pursuant to Tax Law § 1105(a). It is determined that said amounts did not include sales tax. The portions of the lease agreements entered into the record contain no definition of the term "Rental per month", nor does either make any reference to sales tax or the payment thereof. In the absence of any such definition, the terms used in the agreements must be given their ordinary meaning (see___ 22 NY Jur 2d, Contracts, § 210). The ordinary meaning of "rental" is "an amount paid or collected as rent" (Webster's New Collegiate Dictionary [1977]). Thus the lease agreements themselves must be interpreted as contrary to petitioner's position and in support of the Audit Division's position. The billings from RCA to petitioner (prior to the revision thereof [Finding of Fact "12"]), which billed a rental charge plus sales tax, also reflect this ordinary meaning of the term "rental".

E. Petitioner has failed to show that there was any understanding between it and RCA that sales tax was to be included in the amount set forth in the agreement as "rental per month" (see Modu Craft, Inc. v. Liberatore, 89 AD2d 776). Petitioner's refusal to pay the sales tax asserted due by RCA and its successful defense of its position in litigation is outweighed by the language and plain meaning of the agreements themselves and the RCA billings which give effect to that meaning. In this regard, petitioner's failure to submit the entire agreement in the record (Finding of Fact "6") must weigh against petitioner. Also, petitioner's success in court in the RCA actions is given little weight herein given the inapplicability of res judicata or collateral estoppel doctrines. Accordingly, petitioner has failed to establish its position that amounts paid to RCA pursuant to the lease agreements were inclusive of sales tax. The Audit Division's assertion of sales tax due on petitioner's rental payments was therefore in all respects proper.

F. The petition of S-3950 McKinley Parkway, Inc. is in all respects denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated September 12, 1986, is sustained.

DATED: Albany, New York
June 9, 1988

_____/s/_____
ADMINISTRATIVE LAW JUDGE